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No. 08-1554

IN THE

Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

v.

REGAL-BELOIT CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and

[1] In accordance with Rule 37.2(a), AAR has provided notice of its intent to file this brief to counsel for petitioner and respondent. The parties consented to AAR's filing of an *amicus* brief. Letters expressing consent have been filed with the Clerk of the Court. No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry. For AAR's member railroads, which are active participants in international commerce, the significance of this case goes well beyond resolution of the immediate dispute over which the parties are litigating. Because of the significant role railroads play in international commerce, they have a strong interest in a resolution of the split among the Circuits over whether the Carmack Amendment applies to international shipments moving under a through bill of lading.

As petitioner properly points out, the question of whether the Carmack Amendment applies to the inland portion of international multimodal shipments under through bills of lading is "exceptionally important" to the railroad industry. Pet. at 24. AAR's member railroads handle large volumes of freight arriving from overseas, accounting for a significant share of their business. This business is conducted in accordance with established commercial practices designed to assure that goods move reliably, services are paid for, and the terms of the carriage are well understood. The arrangements railroads enter into, and the manner in which their services are offered and priced, are based to a large extent on the settled understandings of the legal regime that applies to international multimodal shipments. Under the Ninth Circuit's decision, these settled practices can no longer be relied upon by railroads participating in international commerce.

The decision below strikes a blow against uniformity and certainty in an area where predictability is critical. As a result, it will lead to inefficiencies as railroads and other participants in intermodal international transportation are forced to accommodate an unworkable legal rule. AAR filed two amicus briefs in *Norfolk Southern Ry. Co. v. Kirby,* another case in which this Court addressed important issues arising in the context of international commerce. Because resolution of the issue raised by this case is at least as critical, AAR is filing this brief on behalf of its member railroads to emphasize to this Court the significance of the impact of this case on the railroad industry and the urgency of the need for this Court to clarify the legal rules under which international commerce takes place.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case of petitioner.

SUMMARY OF THE ARGUMENT

The decision below will have a significant impact on railroads. International trade constitutes a huge segment of the American economy, and typically involves multiple parties, including land-based carriers in the United States. Railroads actively participate in international commerce, moving cargo arriving from overseas by ocean carrier, primarily in containers, to final destination points in the United States. As a practical matter, railroads rarely do business directly with the overseas shippers of the cargo. Rather, they enter into arrangements, at the point a shipment hits the U.S. port, with an ocean carrier (or its agent) or an intermediary, such as a

freight forwarder, often agreeing to ship large volumes of freight delivered by these parties.

Railroads and other participants in international trade have developed efficient business arrangements based on established rules that apply to the multimodal movement of cargo. Until the decision below, and a similar recent ruling by another court of appeals, one of the settled rules was that the Carmack Amendment did not apply to the inland portion of an international shipment moving under a through bill of lading. That rule has been called into question by the decision below; that decision affects not just choice of venue issues, but also the liability regime that governs a shipment, a matter that can greatly impact how transportation services are offered.

ARGUMENT

THE PETITION SHOULD BE GRANTED BECAUSE IT IS ESSENTIAL THAT THIS COURT CLARIFY THE RULES THAT APPLY TO INTERNATIONAL INTERMODAL TRANSPORTATION, AN AREA OF COMMERCE IN WHICH RAILROADS PLAY A SIGNIFICANT ROLE

The time has come for this Court to review another "maritime case about a train wreck." *Norfolk Southern Ry. Co. v. Kirby*, 543 U.S. 14, 18 (2004). Five years ago, in *Kirby*, this Court clarified the rules that apply to multimodal international shipments. Importantly, this Court held that a shipper is bound by the liability terms in a contract entered into between its intermediary and a carrier. Rather than apply traditional agency principles, the Court established an "efficient default rule" of maritime law that enables a carrier to assume that an intermediary

entrusted with cargo is contracting on behalf of the cargo owner, and to rely on the liability terms agreed to with the intermediary. *Id.* at 33-34. As a result, when such a contract extends its coverage to downsteam carriers, they too may avail themselves of its benefits and enforce it against the cargo owner. This Court explained that this rule "ensure[s] the reliability of downstream contracts for liability limitations" and "tracks industry practices." *Id.* at 34.

The reliance interests advanced by the *Kirby* decision are of great importance to the parties involved in the shipment of goods internationally. Respondents are cargo owners (and their insurers) who shipped goods from China to points in the interior of the United States under a through bill of lading.[2] Given the origin and destinations of the cargo, of necessity transportation was provided by both an ocean carrier and a land-based carrier, petitioner, Union Pacific. Petitioners[3] wish to rely on the terms of the governing contract; respondents do not, preferring now to rely on the Carmack Amendment[4] despite having contracted otherwise. The

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[2] A bill of lading is a document evidencing receipt of goods for shipment issued by persons engaged in the business of transporting or forwarding goods, which contains, among other things, the contract for carriage of the goods. BLACK'S LAW DICTIONARY 168 (6th ed. 1990). A bill of lading issued in a foreign country to govern a shipment throughout its transportation from abroad to its final destination in the United States is termed a "through bill of lading." *Capitol Converting Equipment, Inc. v. LEP Transport Inc.*, 965 F.2d 391, 394 (7th Cir. 1992).

[3] The other defendants, Kawasaki Kisen Kaisha, Ltd. and K-Line America, have filed a separate petition for certiorari seeking review of the decision below. Docket No. 08-1553.

[4] Where it applies, the Carmack Amendment establishes a default regime applicable to certain rail transportation with

decision below accommodates respondents' preference, dealing a serious blow to the reliance interests advanced by *Kirby*.

The settled rule until recently, followed by four Courts of Appeals,[5] was that Carmack does not apply to shipments that originate overseas under a through bill of lading unless there is a separate domestic bill of lading issued by the inland carrier. This rule is based on the long-accepted interpretation of Carmack's reach. Where Carmack is inapplicable, or where parties have opted out of Carmack (as they are permitted to do), they may rely on the terms of the bill of lading that covers the transportation. Railroads have long entered into business arrangements based on this accepted rule.

Within the past three years, two Courts of Appeals, including the court below, have issued opinions that diverge from the settled rule. *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.*, 557 F.3d 985 (9th Cir. 2009) (relying on *Neptune Orient Lines, Ltd. v. Burlington Northern & Santa Fe Ry. Co.*, 213 F.3d 1118 (9th Cir. 2000)); *Sompo Japan Ins. Co. of America v. Union Pac. R.R.*, 456 F.3d 54 (2d Cir. 2006). The deep split that has developed among the

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respect to liability for loss of or damage to property received for transportation. It also prescribes where a civil action may be brought and minimum limitation periods for the filing of claims and civil actions. 49 U.S.C. §11706.

[5] *Altadis USA, Inc. v. Sea Star Line, LLC*, 458 F.3d 1288 (11th Cir. 2006); *American Road Service Co. v. Consolidated Rail Corp.*, 348 F.3d 565 (6th Cir. 2003); *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700 (4th Cir. 1993); *Capital Converting Equipment, Inc. v. LEP Transport, Inc.*, 965 F.2d 391 (7th Cir. 1992); *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987).

Courts of Appeals on the applicability of Carmack to international shipments moving on through bills of lading (see Pet. at 16-24) has injected confusion and uncertainty into this vitally important area of commerce, in which railroads play a significant role. If anything, given the multiple parties typically involved, and the potential application of differing legal regimes, clarity and uniformity are demanded.

A. Railroads are Significant Participants in International Commerce

Transportation is the lifeblood of commerce. See Stephen G. Wood, *Multimodal Transportation: An American Perspective on Carrier Liability and Bill of Lading Issues*, 46 AM. J. COMP. L. 403 (1998) ("Central to trade in goods is a transportation process by which the cargo moves from a point-of-origin to a point-of-destination.") "Intermodal" transportation—movements involving two or more modes of transportation—has been a growing force in world markets over the past half century and plays a vital role in the global economy. *See generally,* Gerhardt Muller, *Intermodal Freight Transportation* (3d ed. 1995). Intermodal transportation involving the interchange of freight shipped in containers or trailers has experienced explosive growth since the 1950s. David J. Deboer, *Piggyback and Containers* 159 (1992). Today, containers predominate in international moves, and millions of containers, accounting for billions of dollars in transportation revenue, are transported from overseas to points in the United States each year.

Containers are conducive to intermodal transport. They can be stacked on the deck or in the hold of massive ships. They also can be mounted on chassis

to be hauled by truck or loaded onto flat cars coupled together to make up long, fast, dedicated intermodal trains. "Container technology has transformed the transportation process, converting what was once segmented transportation into through transportation and making multimodal transportation possible. The transportation process creates 'a series of interconnected commercial arrangements' that bring together some or all of the following parties: shipper; banker; insurer; freight forwarder; terminal operator; carrier; and consignee." Wood at 403-04. "The international transportation industry 'clearly has moved into a new era—the age of multimodalism, door to door transport based on efficient use of all available modes of transportation by air, water and land.'" *Kirby,* 543 U.S. at 25 (quoting I T. Schoenbaum, Admiralty and Maritime Law 589 (4th ed. 2004). Railroads often are integral to this process.

Railroads are active participants in international trade and a vital link in the global economy. They serve all the major ports ringing the U.S. coast line from Boston to Seattle-Tacoma. Connecting these ports to numerous inland locations, railroads play a key role in the movement of international freight, originating much export traffic, and serving as intermediate or destination carriers for large volumes of import traffic. Railroads derive approximately $3 billion in annual revenue moving import traffic in several million containers.

Railroads began prominent use of containers in the 1920s, while containerization of ocean cargo became widespread in the late 1950s. Muller at 12-13. During the 1960's, land and sea container transportation evolved from separate services to a combined, integrated service. *Id.* at 17. Marrying up of sea and

land transport often is an effective way of shortening delivery time of international freight movements, as it permits avoidance of circuitous and lengthy ocean routes. So-called "bridge" service may involve ocean carriage from Asia to a U.S. west coast port, and from the east coast to Europe, linked by transcontinental land-based transportation. *Id.* at 104. Even where the final destination is a U.S. port and an all-water route is feasible, efficiency may call for the final leg of the move by land. *Id.* at 106-107. Of course, international moves to inland U.S. destinations must of necessity involve a land-based carrier.

Intermodal traffic is a growing and highly competitive segment of the rail market. Although some U.S. export traffic moves in containers, commonly exported bulk products, such as coal and grain, move to port in open hopper cars. The size and weight of these shipments makes them particularly suited for rail transport. On the other hand, import shipments, which typically consist of high-value items such as consumer goods, electronics, household products and clothes, move primarily in containers that are loaded off of ships at port and onto flatcars designed to carry containers. Before reaching final destination, such traffic may be interchanged with another railroad or mode (*e.g.*, truck).

B. Railroads and Other Participants in International Commerce Have Developed Efficient Business Practices to Meet the Needs of All Parties Which Will Be Undermined if the Conflict in the Circuits is Not Resolved

International cargo shipments usually involve complex, multiparty transactions.[6] However, despite their inherent complexities, these transactions have the straightforward goal of moving freight between two points quickly, economically and efficiently. Shippers of cargo have an interest in making arrangements for a complete transaction, *i.e.*, shipment from origin to final destination, with all necessary transportation and associated services provided. With this aim in mind, the details of who is accomplishing each aspect of the service is of lesser importance. Shippers do not enter into individual relationships with numerous parties providing various aspects of the service, some of whom may be located on different continents. Nor would it be economically efficient if legal rules encouraged such arrangements.

Conversely, domestic transportation companies, like railroads, do not contract directly with overseas shippers of goods. To do so would be difficult and impractical. Instead, a more efficient means of doing

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[6] Over the past few decades intermodalism has spurred the creation of many companies devoted not to actually moving cargo, but to the support and facilitation of transportation in a variety of ways. Among other services these companies provide is the consolidation of many small shipments into large consignments for more economical shipping. Muller at 129. In addition, loading, unloading and storage services typically are components of intermodal moves.

business has developed. Typically, railroads enter into arrangements with entities with U.S. contacts: in this case, petitioner entered into a contract with the ocean carrier, through its American agent. A common arrangement is for railroads to sell blocks of space on their trains in volumes to accommodate the cargo of numerous shippers. Alternatively, railroads enter into similar arrangements with steamship companies calling on U.S. ports, agreeing to transport cargo that is off-loaded from their ships without regard to the identity of the individual shipper or the content of individual containers.

Securing space on the railroads through intermediaries allows business to be conducted efficiently, obviating the need for foreign shippers to locate and make arrangements with a land-based U.S. carrier for each shipment. See *Kirby*, 543 U.S. at 26. (It was to "Kirby's advantage to arrange for transport from Sydney to Huntsville in one bill of lading, rather than to negotiate a separate contract-and to find an American railroad itself-for the last leg.") Indeed, the ability to consolidate freight of numerous shippers and arrange for through transportation to destination, utilizing multiple carriers, some of whom the foreign shipper (or its freight forwarder) need not directly contact, is of benefit to shippers worldwide. In addition to relieving the shipper of the need to enter into numerous discrete arrangements, the ability to tender large volumes of freight enables the freight forwarder to obtain better rates than could individual shippers attempting to ship small volumes of cargo.

Regardless of the precise arrangement, it is the general practice that a party other than the foreign shipper will make the arrangement that will result in

its goods being placed on a train for inland transport in the United States, transportation the foreign shipper knows will, and must, occur if its goods are to reach their destination. It goes without saying that a single entity does not transport goods both by sea and land, and also provide all the loading and unloading services as needed. But the fact remains that these are all pieces of the unitary service sought by shippers wishing to move cargo from a specific origin point to a specific destination point. The shipper knows full well that when it is contracting for the service, it is contracting for services which inevitably will be performed by several parties, some located in different countries and continents. Not surprisingly, in this case the through bill of lading permitted the ocean carrier to sub-contract on terms at its discretion. See *Regal-Beloit*, 557 F.3d at 989.

When moving overseas import traffic, railroads will rely on the arrangements made by the ocean carrier (or other party) that will be delivering the goods to the U.S. port and who deals directly with the overseas shipper. The railroad enters into a contract with the ocean carrier (or its agent), which from the railroad's standpoint is the shipper. Any rights the overseas shipper may have against the railroad are derivative of the ocean carrier's rights under the contract between the railroad and the ocean carrier.

In order for the process to work effectively, there needs to be a clear understanding on the part of the parties involved about what liability regime and other rules apply to multimodal, international shipments. One of the problems that has vexed international intermodal carriage is the varying liability schemes governing respective modes of transport. Typically, conflicting liability schemes have been

addressed by contractually extending the rules that apply to ocean carriage to the inland leg of the move, as is freely permitted by the Carriage of Goods by Sea Act (COGSA), ch. 229, 49 Stat. 1207 (1936), 46 U.S.C. § 30701 (Notes). See Marva Jo Wyatt, *Contract Terms in Intermodal Transport: COGSA Comes Ashore*, 16 TUL. MAR. L.J. 177, 178 (1991). But, the recent decisions of the Ninth and Second Circuits have cast doubt on the validity of such contractual extensions of COGSA.

Carmack, which was added to the Interstate Commerce Act in 1906,[7] and COGSA, which governs transport by ship to or from U.S. ports, provide conflicting regimes. Carmack imposes fairly strict default rules, though there is the opportunity to opt out of those rules. COGSA, which may be extended contractually to parties participating in a shipment both before loading and after unloading of the ship (as was done in this case) *Regal-Beloit*, 557 F.3d at 991,[8] offers more flexibility. Indeed, the Court below noted that if COGSA applied, the choice of forum provision in the through bill of lading would be enforceable, while if Carmack applied, it would not. *Id.* And, though not an issue before the Court at this point in the litigation, the scope of the carrier's liability for damage to the cargo might differ greatly depending on whether Carmack or COGSA applies.

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[7] Act of June 29, 1906, ch.3591, §7, 34 Stat. 584, 595.

[8] Contractual extensions of COGSA's liability limitations to cover parties participating in the shipment prior or subsequent to the ocean carriage are known as Himalaya clauses. *Generali v. D'amico*, 766 F.2d 485, 487-88 (11th Cir. 1985).

COGSA affords shippers of cargo by sea a choice: to declare a higher value for the goods and pay a higher freight rate, or accept the liability limitation of $500 per package set forth in the statute. 46 U.S.C. § 30701 (Notes Sec. 4(5)). The former option is almost never exercised. Instead, the shipper, accepting the carriers' limited liability, will choose to insure the cargo for its full value. This regime makes commercial sense. The shipper, with whom the traffic originates, knows exactly what is being shipped and the shipment's value, and can likely cover potential loss far more effectively and economically by procuring insurance than by paying full freight rates. While the immediate issue here is proper venue, the fact that the extent of the parties' liability can also turn on whether Carmack applies underscores the significance of the question presented by the petition.[9]

The decision to extend COGSA's regime to downstream parties through the Himalaya clause in the bill of lading is consistent with accepted practices and in accord with the expectation that uniform rules will govern an entire shipment, from point-of-origin to point-of-destination. See *Kirby*, 543 U.S. at 28-29. Carriers—particularly a railroad situated a continent away that has arranged to accept numerous containers without individualized inquiry as to the specific nature of the goods contained therein or the identity of the particular shipper of the goods—generally are not in a position to ascertain the goods' value. Ship-

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[9] This case involves an appeal from the trial court's grant of a motion to dismiss based on improper venue because the parties had contracted out of Carmack, triggering application of the venue provision in the through bill of lading, a ruling reversed by the Court of Appeals. See Pet. at 10.

ments remain in their containers, unopened until final destination is reached. Rather, the shipper is in the best position to determine whether to declare a high value or to insure, and at what level. Similarly, insurers who underwrite this insurance know they are insuring a risk for which other parties' liability is limited. Application of Carmack, with its strict liability scheme, would undermine the assumptions of all parties. *Cf. Kirby*, 543 U.S. at 34 (rule that an intermediary may bind a shipper on liability limitations "merely ensure[s] the reliability of downstream contracts").

While it is vitally important to settle the issue of whether Carmack applies to international shipments moving under a through bill of lading, that is not the end of the voyage. Under the ICC Termination Act,[10] parties are free to enter into transportation arrangements that limit the application of Carmack by contract: that is not in dispute. However, because it involved "exempt" traffic, the matter was remanded to the District Court to determine whether the parties opted out of Carmack in a manner which satisfied the requirements of ICCTA. *Regal-Beloit*, 557 F.3d at 1003. If, in fact, Carmack does apply to inland rail transportation moving under a through bill of lading, clear rules on how to opt out of Carmack are essential.

A particularly troubling aspect of the decision below is that even though the railroad offered Carmack compliant terms to its shipper, K-Line, and

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[10] Pub. L. No. 104-88, 109 Stat. 803 (1995), *codified at* 49 U.S.C. §§ 10101 *et seq.* ICCTA replaced the Interstate Commerce Act, eliminated the ICC and assigned its surviving functions to the Surface Transportation Board (STB). See 49 U.S.C. §§ 701-702.

even though the plaintiff shipper in China granted K-Line the authority to subcontract at its discretion, the Ninth Circuit concluded that it was necessary to offer Carmack-compliant terms to the plaintiff shipper. Certainly, this puts petitioner, and any other railroad in the United States, in a nearly impossible position. While a railroad can offer Carmack-compliant terms to the party from whom it receives the freight, it is not in a position to assure such an offer is made overseas, as part of a contract negotiation that occurs an ocean away. See *Kirby*, 543 U.S. at 35 (acknowledging the impracticality of seeking out information about the terms of upstream contracts). From the standpoint of an inland carrier, any obligation it has with respect to Carmack must be satisfied in its dealing with the party from whom it receives the freight regardless of whether the traffic is exempt.

Additionally, in remanding the case to the District Court, the Ninth Circuit suggested that the District Court develop the record to determine whether the parties properly opted out of Carmack. Such a task for the District Court seems unnecessary. The overseas shipper specifically negotiated and entered into an international maritime contract to govern the entire shipment of its cargo and granted the ocean carrier, the shipper's intermediary with respect to the railroad, the authority to arrange for inland transportation as the ocean carrier saw fit. Where sophisticated commercial parties negotiate a contract, whether or not that contract is for exempt traffic, and those parties agree to terms that alter Carmack's requirements, a court should find that there was compliance with the requirements of ICCTA.

* * * *

The major U.S. freight railroads operate over extensive networks of between 20 and 33 thousand miles,[11] covering numerous federal circuits. The major eastern carriers, Norfolk Southern and CSX Transportation, Inc., whose networks cover territory where the circuits are geographically smaller, operate in most of the federal circuits. The major western roads, petitioner and BNSF, operate from the west coast, ultimately crossing the Mississippi river, also covering numerous circuits. Thus, a single bill of lading may cover transportation over several jurisdictions. (For example, a shipment from South America to a southeastern U.S. port and moved from there by rail to Boston, would likely move through states located in the Eleventh, Fourth, Third, Second and First Circuits. A move from the west cost to east coast would also move through a similar number of judicial circuits.) The split among the federal courts of appeals, exacerbated by the decision below, if unresolved, will mean that the parties' intent with respect to damages and liability claims, as set forth in their contracts, may or may not be ignored by the foreign shipper depending on where an accident or event giving rise to a dispute occurs. This is untenable for railroads. Failure to clarify the important issues raised by this case will leave participants in international commerce to operate under a cloud of uncertainty when moving billions of dollars of cargo over oceans and continents.

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[11] Association of American Railroads, *Railroad Facts* 70-71, 74, 76 (2008 ed.).

International commerce demands certainty and predictability. Review of this case by this Court will help achieve that important goal.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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